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NO. 86-2087

Supreme Court, U.S.  
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**IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1986**

**BOB SCHWARTZ,**  
*Petitioner,*

**V.**

**CITY OF GRAND PRAIRIE, TEXAS and  
STATE OF TEXAS,**  
*Respondents.*

**On Petition for a Writ of Certiorari  
to the Supreme Court of Texas**

**TEXAS'S MEMORANDUM IN OPPOSITION  
TO PETITION FOR CERTIORARI**

**JIM MATTOX**  
Attorney General of  
Texas

**MARY F. KELLER**  
Executive Assistant  
Attorney General

**DUDLEY FOWLER**  
Assistant Attorney  
General  
Chief, Highway  
Division

**JOHN M. SCHILTZ\***  
Assistant Attorney  
General  
P. O. Box 12548  
Austin, Texas 78711-2548  
(512) 463-2004  
Attorneys for  
Respondents

\*Counsel of Record

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1986

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NO. 86-2067

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BOB SCHWARTZ,  
*Petitioner,*

V.

CITY OF GRAND PRAIRIE, TEXAS and  
STATE OF TEXAS,  
*Respondents.*

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On Petition for a Writ of Certiorari  
to the Supreme Court of Texas

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TEXAS'S MEMORANDUM IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI

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Respondent Texas accepts Petitioner's statement of the case (Pet. pp. 5-7) with the following qualifications: (a) the assertion of Petitioner's feelings of futility about appealing the denial of his application for a building permit is outside the record of the case; and (b) a fair statement of the case should include the unrefuted contentions made by Texas in the trial court on Motion for Summary Judgment (Tex. App. A):

- That Texas did not participate in the adoption of the ordinances complained of;
- That Texas, *pursuant to statute*, planned for the roadways through Grand Prairie, Texas as part of the Texas Highway System.

Petitioner's case, insofar as the State of Texas is concerned, is for inverse condemnation bottomed upon (a) a claim that the State conspired with the City of Grand Prairie for the enactment of ordinances proscribing the granting of building permits within the corridor of proposed State Highway 161, previously announced by the State; and (b) a claim that the State, after announcing the project in 1970 failed to acquire Petitioner's property by July 27, 1984, to his detriment, under the Fifth and Fourteenth Amendments to the United States Constitution.

The Respondent State is involved in this cause because on April 19, 1972, the State Highway and Public Transportation Commission (State Highway Commission), an agency of the Respondent State, approved a location for a new public highway, subsequently designated State Highway 161 (SH 161), following a 1970 public hearing to determine the location of the highway through the Cities of Irving and Grand Prairie. Petitioner purchased his "Dalworth Street Lot" in 1972. Subsequently the State Department of Highways and Public Transportation (State Highway Department), another agency of the Respondent State, held separate public hearings on the design of two sections of SH 161 that will be routed through the City of Grand Prairie.

At a design hearing, held on June 14, 1973 in Grand Prairie, there was considered a section of

the SH 161 project that would require the acquisition of right-of-way from a portion of Petitioner's property, known as "Dalworth Street Lot". At a second design hearing, held on January 15, 1975, in Grand Prairie, there was considered another section of the SH 161 project that would require the acquisition of right-of-way from a portion of the Petitioner's property, referred to as "the 19th Street land."

The Respondent State has not acquired right-of-way from either of the Petitioner's properties; initially, because funding was not available, and currently, because the United States District Court, Northern District of Texas, has enjoined acquisition of the right-of-way for SH 161 until United State Department of Transportation officials comply with provisions of the National Environmental Policy Act and implementing regulations.

1. The State Highway Department is the operating arm of the State Highway Commission. Sec. (b) of Article 6665; Article 6666 of the Texas Civil Statutes. Sec. 1 of Article 6674w-1 of the Texas Civil Statutes authorizes the State Highway Commission, among other directives, to plan for future controlled access highways, such as the SH 161 project, as part of the State Highway System established by Article 6674b of the Texas Civil Statutes.

2. The Petitioner purchased both properties involved in this cause *after* the route for SH 161 through Grand Prairie was approved by the State Highway Commission. The Petitioner purchased "the 19th Street land" after it had been identified at the 1975 public hearing as one of the properties in the path of the proposed right-of-way for SH 161.



3. The State Highway Department intends to construct SH 161 with Federal-aid highway funds. It continued planning for the project after the public hearings. In 1979 the precise right-of-way requirements for SH 161 were established. Subsequently, lack of funds prevented the Respondent State from acquiring substantial portions of the right-of-way for SH 161, including the right-of-way parcels required from the Petitioner's properties. Although the funding impediment has now been overcome, in April 1983, a group of Grand Prairie residents brought suit in the United State District Court, alleging among other deficiencies in the SH 161 planning process, a failure on the part of United State Department of Transportation officials to satisfy the statutory and regulatory criteria for Federal-aid highway projects prescribed by the National Environmental Policy Act (NEPA). 42 U.S.C. §4331 *et seq.*

4. The Federal litigation was resolved adversely to the Federal officials in 1985. *Association Concerned About Tomorrow, Inc. (ACT) v. Dole*, 610 F.Supp. 1101 (N.D. Tex., 1985). As a result of the Federal Court decision, no right-of-way may be acquired for the part of SH 161 proposed for Grand Prairie and no Federal funding may be made available to Respondent State for the Grand Prairie portion of the project until further environmental processing has been performed that conforms with NEPA requirements.

5. A distinct possibility now exists that neither or only one of the Petitioner's properties involved in this cause may be needed for the SH 161 project following completion of the environmental studies required by the Federal Court. Whatever the final outcome of the environmental processing, the Petitioner's right to receive his constitutionally guaranteed adequate compensation for his properties

that may be acquired for SH 161 has not been diminished by any actions of officials or employees of Respondent State. At all times since the commencement of the SH 161 project, the Petitioner remains as free to dispose of his properties as he was to acquire them.

There being no evidence before the Court on the record that Texas had any hand in the ordinances complained of, Petitioner's only possible claim against Texas is for an inverse condemnation in its planning of a highway project that might ultimately require the condemnation of Petitioner's property. Such a claim is untenable in Texas and in the federal courts under the Fifth Amendment.

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1. See *Hubler v. City of Corpus Christi*, 564 S.W.2d 816, 821 (Tex. Civ. App. - Corpus Christi, 1978; writ of error refused by Texas Supreme Court with notation "No Reversible Error"), and cases cited; *City of Houston v. Bigger*, 380 S.W.2d 700, 704 (Tex. Civ. App. - Houston 1964; writ of error refused by Texas Supreme Court with notation "No Reversible Error"; cert. denied, 380 U.S. 962, 85 S.Ct. 1105, 14 L.Ed.2d 153 (1964)).

2. *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 104 S.Ct. 2187 (1984) "Impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking." *Danforth v. U.S.* 308 U.S. 271, 285; *Sanders v. Erreca*, 317 F.2d 960, 964 (9th Cir. 1967); Cert. Den. 389 U.S. 1039; *Stone Mountain Game Ranch v. George*, 746 F.2d 761 (11th Cir. 1984). *First Lutheran Church v. Los Angeles County*, 1987, Slip Opinion at p. 15.



6. Actions by highway officials and employees of the Respondent State relative to Petitioner's properties have been conducted in furtherance of their statutory duty to plan for, design and lay out public highways that will become part of the State Highway System of Texas. No official or employee of the Respondent State has either allegedly or in fact physically interfered with either of the Petitioner's properties nor attempted to assert any possessory rights in either property.

7. The essence of the Petitioner's complaint is his temporary loss of bargain. The Petitioner's business is to speculate on the appreciation of real estate. The inability of the Respondent State to acquire his properties in 1983 or 1984 for SH 151 apparently frustrated the Petitioner. He erroneously suggests that the right to profit promptly by the sale of properties he elects to buy is constitutionally guaranteed. The reality in this case is that the Petitioner, after purchasing property in the path of a future highway right-of-way, became impatient with the right-of-way acquisition process.

8. The Petitioner's contentions totally ignore the State and Federal statutory mandates on highway officials and employees of Respondent State to hold public hearings before going forward with projects such as SH 161. Sec. 1 of Article 6674w-1, *supra*; 23 U.S.C. §128. A prime reason for requiring such hearings is to make the public, including the Petitioner, aware of a proposed highway project.

The State of Texas concurs in the opinion of the Texas Court of Appeals that Respondent's suit

in the Texas District Court was not ripe<sup>3</sup>, and that Respondent lacked standing to sue on his alleged claims.

The State of Texas concurs in, and adopts as its own, the Brief of the City of Grand Prairie in the premises.

### CONCLUSION

1. The State of Texas, having had no part in the passage or implementation of the ordinance complained of, having had no control over the availability of funds to acquire right-of-way for and to construct Highway 161, and having been enjoined by the U.S. District Court from proceeding in any fashion with the highway, cannot possibly be said to have violated any Fifth or Fourteenth Amendment rights of Respondent.

2. Respondent's claims were not ripe for adjudication as the result of which he had no standing to sue on them in the Texas Court.

For the foregoing reasons the Petition should be denied.

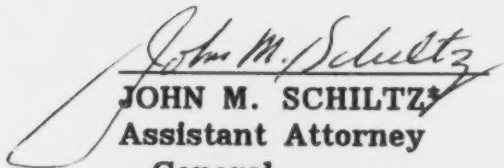
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3. This Court has endorsed the ripeness requirement of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194 (1985) in *First Lutheran Church v. Los Angeles County*, (1987), Slip Opinion at p. 7, footnote 6.

**JIM MATTOX**  
Attorney General of  
Texas

**MARY F. KELLER**  
Executive Assistant  
Attorney General  
for Litigation

**DUDLEY FOWLER**  
Assistant Attorney  
General  
Chief, Highway  
Division

  
**JOHN M. SCHILTZ\***  
Assistant Attorney  
General

**P. O. Box 12548**  
**Austin, Texas 78711-2548**  
**(512) 463-2004**  
**Attorneys for**  
**Respondents**

**\*Counsel of Record**

APPENDIX A-1

NO. 84-3406-B

BOB SCHWARTZ		IN	THE	44TH
VS.		JUDICIAL DISTRICT		
		COURT	DALLAS	
CITY OF GRAND				
PRAIRIE, TEXAS				
AND THE STATE OF				
TEXAS		COUNTY, T E X A S		

RESPONSE TO DEFENDANT STATE OF TEXAS  
TO PLAINTIFF'S SECOND MOTION FOR SUMMARY  
JUDGMENT AND TO MOTION FOR PARTIAL  
SUMMARY JUDGMENT OF DEFENDANT  
CITY OF GRAND PRAIRIE

TO THE HONORABLE JUDGE OF THE 44TH  
JUDICIAL DISTRICT COURT:

Defendant State of Texas DOES NOT oppose a Motion for Partial Summary Judgment heretofore filed in the captioned cause by Defendant City of Grand Prairie, Texas.

Defendant State of Texas DOES oppose the Plaintiff's Second Motion for Summary Judgment heretofore filed in this captioned cause for the following grounds:

1. Defendant State of Texas has not taken or damaged the properties of the Plaintiff, more fully described in Paragraph II of Plaintiff's Second Amended Original Petition, in any manner contemplated by the Constitution or statutes of the United States and the State of Texas to entitle the Plaintiff to maintain this cause of action against the Defendant State of Texas, until the said Defendant has waived its sovereign immunity against the bringing of this cause of action against it.

## APPENDIX A-2

2. Defendant State of Texas has not denied the Plaintiff any use or prevented his right to sell the property, more fully described in Paragraph II of Plaintiff's Second Amended Original Petition, to entitle Plaintiff to assert any claim whatsoever herein for monetary compensation from the Defendant State of Texas until the said Defendant waives its sovereign immunity against the bringing of this cause of action against it.

3. The Defendant State of Texas did not participate in the adoption by the City of Grand Prairie of certain ordinances, more fully identified in Paragraph IV of Plaintiff's Second Amended Original Petition, and cannot be held liable in this cause for any damages Plaintiff alleges he sustained by reason of any or all of the said ordinances, and;

4. The State Highway and Public Transportation Commission, acting by and for the Defendant State of Texas pursuant to statute, authorized and directed the State Department of Highways and Public Transportation to plan for and lay out roadways throughout the State of Texas, including roadways through the City of Grand Prairie, Texas, as part of the State Highway System; therefore, performance of those duties and responsibilities by the said State Department of Highways and Public Transportation cannot confer upon the Plaintiff the right to maintain this cause of action against the State of Texas by reason of such actions by the said governmental agencies.

WHEREFORE, Defendant State of Texas respectfully requests the Court to grant the Motion for Partial Summary Judgment heretofore filed in this cause by Defendant City of Grand Prairie and to deny, in all things, the Plaintiff's Second Motion

## **APPENDIX A-3**

for Summary Judgment and charge all costs herein against the Plaintiff.

Respectfully submitted,

**JIM MATTOX  
ATTORNEY GENERAL OF  
TEXAS**

**DAVID R. RICHARDS  
EXECUTIVE ASSISTANT  
ATTORNEY GENERAL**

**DUDLEY FOWLER  
ASSISTANT ATTORNEY  
GENERAL  
CHIEF, HIGHWAY  
DIVISION**

/s/ David R. Thomas  
**DAVID R. THOMAS**  
Assistant Attorney  
General  
714 Jackson, Suite 700  
Dallas, Texas 75202  
(512) 742-8944  
State Bar No. 198847000

### **CERTIFICATE OF SERVICE**

This is to certify that the foregoing Response to Defendant State of Texas to Plaintiff's Second Motion for Summary Judgment and Motion for Partial Summary Judgment of Defendant City of Grand Prairie in the 44th Judicial District Court of Dallas County, Texas, has been delivered by United States Postal Service, Certified Mail, Return Receipt Requested, this \_\_\_\_\_ day of March, 1985, to the following attorneys of record in said cause:



## **APPENDIX A-4**

- 1. Jerry D. Brownlow  
1001 North Carrier  
Grand Prairie, Texas 75050  
Attorney for Plaintiff Bob Schwartz;**
- 2. Clayton Hutchins  
City Attorney  
P. O. Box 11  
Grand Prairie, Texas 75051**
- 3. William R. Allensworth  
Haynes and Boone  
4300 InterFirst Two Building  
Dallas, Texas 75270  
Attorney for Defendant City of Grand  
Prairie, Texas**

---

**DAVID R. THOMAS  
Assistant Attorney  
General**

